

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re WELLS FARGO RESIDENTIAL
MORTGAGE LENDING
DISCRIMINATION LITIGATION

No. C 08-1930 MMC (JL)

**ORDER DENYING DEFENDANTS'
MOTION TO COMPEL DISCOVERY
(Docket # 32)**

This Document Relates To:

ALL ACTIONS

Introduction

Plaintiffs' motion to compel production of documents and to participate in discovery in good faith (Docket # 28), and Defendant's motion to compel production of documents and further responses to discovery (Docket # 32) came on for hearing. Appearing for Plaintiffs were Andrew Friedman, BONNETT FAIRBOURN FRIEDMAN & BALINT, Phoenix, Arizona; Gary Klein, RODDY KLEIN & RODDY, Boston, Massachusetts; Willow Radcliffe, COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP, San Francisco. Appearing for Defendant were Tyree Jones, REED SMITH, LLP, Washington, D.C.; David Reidy, REED SMITH, LLP, San Francisco. The Court carefully reviewed and considered the moving and opposing papers and the arguments of counsel at the hearing. The Court ruled from the bench, granting in part and denying without prejudice in part Plaintiff's motion, as reflected in the Minute Order, and granted Defendant's request for the

1 opportunity to further brief the issue of privilege of loan methodologies. The Court took
2 Defendant's motion under submission and hereby issues its order denying the motion.

3 **Meet and Confer**

4 Parties met and conferred on these disputes by letter, email, and conference call.
5 Some counsel are outside the Bay Area, so those counsel are not required to meet and
6 confer in person.

7 **FACTUAL BACKGROUND: PLAINTIFFS' CLAIMS**

8 In the five class actions consolidated in this Multi-district Litigation Proceeding,
9 Plaintiffs challenge Wells Fargo's lending practices as discriminatory under the Fair
10 Housing Act and Equal Credit Opportunity Act. Plaintiffs Venturas, Rodriguez and Williams
11 also allege intentional discrimination under 42 U.S.C. §§ 1981 and 1982.

12 Plaintiffs allege that Wells Fargo has engaged in disparate impact racial
13 discrimination. The Complaint alleges that Wells Fargo developed and has uniformly
14 followed a "Discretionary Pricing Policy," a company-wide practice through which it
15 authorizes and incentivizes its loan officers, mortgage brokers and correspondent lenders
16 to impose subjective, discretionary loan charges and interest rate mark-ups. These charges
17 and rate increases are totally unrelated to the borrower's objective credit risk.

18 Wells Fargo carries out its Discretionary Pricing Policy as follows. When a consumer
19 applies for a loan, the loan officer, broker, or correspondent lender transmits the loan
20 application information to Wells Fargo for underwriting. Wells Fargo evaluates the risk of
21 the loan based on the borrower's credit and financial information contained in the
22 application (e.g., credit score, loan-to-value ratio, debt-to-income ratio, etc.). Based on the
23 applicant's objective credit and financial information, Wells Fargo determines that the
24 applicant qualifies for a risk-based interest rate, called a "par rate" -- the interest rate at
25 which the risk of the proposed loan is acceptable to Wells Fargo. Wells Fargo's par rates
26 are compiled and disseminated to its loan officers, brokers, and correspondent brokers
27 through "rate sheets" or by other means. That transmission generally takes place
28 electronically.

1 Plaintiffs' disparate impact discrimination claims do not challenge this objective
2 component of Wells Fargo's Discretionary Pricing Policy. As alleged in the Complaint, it is
3 Wells Fargo's policy of allowing loan officers, mortgage brokers and correspondent lenders
4 who arrange its loans virtually unfettered subjective decision-making authority to add
5 discretionary costs, fees and "mark-ups" to the par rate. Wells Fargo gives its brokers
6 discretion to impose non-risk based loan fees and interest rate markups (in addition to the
7 par rate) on loans to qualified borrowers.

8 Wells Fargo allows and encourages its loan officers, brokers and correspondent
9 lenders to – at their discretion – impose subjectively determined charges such as a yield
10 spread premium and other loan charges that have no relation to the risk of the loan by
11 providing enhanced compensation for doing so. Such non-risk based charges are typically
12 financed by the borrower over the life of the loan, resulting in a higher effective rate.

13 On its face, Wells Fargo's Discretionary Pricing Policy appears facially neutral. But
14 Plaintiffs allege that the loan fees and rate mark-ups subjectively imposed by loan officers,
15 brokers and correspondent lenders adversely impacts minority borrowers, causing them to
16 pay far more for their loans than similarly-situated non-minority borrowers. The disparate
17 impact is a direct result of Wells Fargo's Discretionary Pricing Policy because Wells Fargo
18 designed, disseminated and controlled the practice. Wells Fargo's Discretionary Pricing
19 Policy has led to hundreds of millions of dollars in unjustified and hidden costs to minority
20 homeowners across the United States.

21 **Plaintiff's Motion**

22 The Court ruled from the bench on this motion, granting in part and denying without
23 prejudice in part, and granted Defendant's request for the opportunity to provide the Court
24 with further briefing on the issue of attorney-client privilege for certain loan methodologies.

25 **Defendant's Motion**

26 Defendants ask this Court to order Plaintiffs to produce the following, within seven
27 days of the hearing on this motion:
28

- Information and documents regarding Plaintiffs' financial histories (Interrogatory Numbers 4, 5, 8, and 9; Request for Production Numbers 3, 4, and 6);
- Information and documents regarding Plaintiffs' creditworthiness (Interrogatory Numbers 3, 6, and 7; Request for Production Numbers 1, and 16); and
- Information and documents regarding Plaintiffs' borrowing histories (Interrogatory Numbers 2, 13, and 14; Request for Production Numbers 2 and 18).

Moreover, Wells contends that Plaintiffs agreed to supplement their responses to the following requests, but have failed to do so:

- Information and documents regarding Plaintiffs' financial and credit histories (Interrogatory Numbers 1 and 5; Request for Production No. 14);
- Detailed descriptions of Plaintiffs' alleged damages (Interrogatory No. 25);
- Documents regarding Plaintiffs' borrowing histories (Request for Production No. 2);
- Information and documents the loan transactions at issue (Interrogatory Numbers 10 and 12; Request for Production Numbers 8-12, and 17);
- Information and documents substantiating Plaintiffs' allegations against Wells Fargo (Interrogatory Numbers 16, 17, 19-21, 23-25, and 27; Request for Production Numbers 13, 15, and 19-28);
- Specifically, an explanation of the alleged "discretionary pricing policy" (Interrogatory No. 19).

Wells Fargo argues that its discovery requests are proper and necessary to its defenses in these actions and asks that the Court order Plaintiffs to provide the discovery requested within seven days of the hearing on this matter

Wells Fargo, during the meet and confer process, which took place by letter, reminded Plaintiffs that their Complaints allege that they were qualified for loans on better

1 terms than the terms that they received solely on the basis of race. Given these allegations,
2 Wells Fargo argued that Plaintiffs' history of mortgage borrowing, their other real estate
3 holdings and investments, rental income, and creditworthiness, as well as their motivations
4 in and experiences with lending generally, were therefore relevant to Wells Fargo's
5 defenses in these consolidated actions. Wells Fargo also asked that Plaintiffs produce all
6 documents responsive to its Requests for Production, as opposed to only producing
7 documents contained in their loan files, and all documents relating to their allegations of
8 discrimination contained in their Complaints.

9 Wells argues that Plaintiffs' objections on the basis of confidentiality and privacy are
10 without merit as this Court has already entered the Stipulated Protective Order governing
11 the treatment of confidential consumer information in this action. Furthermore, these
12 Interrogatories are narrowly tailored to obtain information concerning Plaintiffs' financial and
13 credit history, which information is discoverable because Plaintiffs have placed their
14 creditworthiness at issue by filing these actions. FRCP 26(b)(2) (discovery proper regarding
15 any non-privileged matters that are relevant to a party's claim or defense); *Kee v. R-G*
16 *Crown Bank*, 2007 WL 2406938, *2 (D.Utah, 2007) (defendant held entitled to discovery of
17 the plaintiff's bank accounts where plaintiff's claims put financial condition at issue); *Wilson*
18 *v. Super. Ct.*, 63 Cal. App. 3d 825, 830 (1976) (taxpayer's privilege held waived where
19 plaintiff placed in issue the existence and content of tax returns).

20 Wells argues that Plaintiffs' relevancy objections are similarly misplaced, because, in
21 their Complaints, Plaintiffs have expressly alleged that despite being qualified for mortgage
22 loans with favorable terms, they were given less favorable terms on account of racial
23 discrimination. See, e.g., Brown Complaint at ¶38; Rodriguez Complaint at ¶40. Given this
24 allegation, Wells Fargo argues it is entitled to discover what those qualifications for more
25 favorable loans were, rendering discovery of risk-based credit characteristics not only
26 relevant, but essential to Wells Fargo's defense of this action. According to Wells, Plaintiffs
27 also allege that because they are minority borrowers, they were steered into less favorable
28 loans, and, unbeknownst to them, Wells Fargo also utilized a subjective, discretionary

1 pricing tool to arrive at the interest rates and fees charged on their loans. See, e.g.,
2 Williams Complaint at ¶15; Brown Complaint at ¶¶37, 38. Wells says that Plaintiffs further
3 allege that they were harmed as a result of this so-called “discretionary pricing policy” and
4 that members of the class did not know the terms, fees, and costs associated with their
5 loans. See, e.g., Williams at ¶62; Brown Complaint at ¶37. Given allegations such as these,
6 Wells Fargo is entitled to discover information regarding each Plaintiff’s real estate acumen
7 and experience in applying for, obtaining, and accepting the terms of mortgage contracts.

8 Wells argues that, by filing their Complaints, Plaintiffs placed their creditworthiness,
9 borrowing histories, and financial conditions squarely at issue. As such, Plaintiffs’ financial
10 backgrounds are directly relevant to their claims, and to Plaintiffs’ ability to represent the
11 putative class, and is therefore within the scope of pre-certification discovery. See
12 Schwarzer, J., *California Practice Guide: Federal Civil Procedure Before Trial* (Rutter
13 Group rev. ed. 2004) p. 10-112.8, ¶ 10:740 (citing *Krim v. BancTexas Group, Inc.*, 99 F.3d
14 775, 777-78 (5th Cir. 1996)).

15 Plaintiffs’ Opposition

16 Plaintiffs on January 14, 2009, the day Wells filed its motion to compel, filed
17 supplemental responses to Interrogatories No. 10, 12, 16, 17, 19, 20, 21, 23, and 27 and
18 Document Requests Numbers 8-13, 17, 19-22, 26 and 27. Plaintiffs oppose Wells’ motion
19 to compel additional responses on the basis that Wells Fargo mischaracterizes Plaintiffs’
20 allegations in their Complaint in order to obtain personal confidential financial information to
21 intimidate and harass Plaintiffs.

22 According to Plaintiffs, Wells Fargo baldly claims that Plaintiffs have made this
23 information relevant by placing their qualification for a Wells Fargo loan at issue. But
24 Plaintiffs have done no such thing. Plaintiffs challenge as racially discriminatory
25 Defendant’s loan pricing practice that has nothing to do with Plaintiffs’ credit and financial
26 characteristics. Plaintiffs do not challenge Wells Fargo’s consideration of their financial and
27 credit backgrounds in underwriting their loans. Plaintiffs do not claim that Wells Fargo
28

1 discriminates against minorities in determining whether borrowers qualify for a “par” interest
2 rate based on their credit and financial information.

3 Rather, Plaintiffs claim that *after* Wells Fargo underwrote their loans and qualified
4 them at a particular par interest rate, it then authorized the broker, loan officer or
5 correspondent lender who arranged the loan to – at their discretion – add non-risk based
6 loan fees, charges and rate mark-ups. These subjectively-determined loan price increases
7 are unrelated to borrower risk, and have nothing to do with the applicant’s financial or credit
8 standing. Plaintiffs intend to show that this discretionary pricing policy exerts a
9 discriminatory disparate impact because minority borrowers are saddled with higher
10 discretionary loan fees, charges and rate mark-ups than nonminorities with the same or
11 similar credit and financial characteristics. The financial and credit background of the
12 borrower – including Plaintiffs – is irrelevant because it has nothing to do with the allegedly
13 discriminatory loan pricing practice challenged here.

14 Plaintiffs argue that Wells Fargo’s reason for demanding Plaintiffs’ financial and
15 credit information is a pretext. Wells Fargo obtained all the financial and credit information
16 on Plaintiffs it deemed necessary when it underwrote their loans in the first place. The only
17 possible use of the information now is either to re-underwrite the loans or re-qualify
18 Plaintiffs for them, or to otherwise harass and intimidate Plaintiffs by delving into personal
19 financial information.

20 A look at Wells’ Reply reveals Wells’ true motivation for requesting Plaintiffs’
21 financial and credit history. “Plaintiffs allege disparate impact discrimination in the mortgage
22 credit application process. There can be no dispute that Wells Fargo is entitled to discover
23 information bearing on the veracity of the representations made by Plaintiffs during the
24 credit application process and the evidentiary bases for Plaintiffs’ allegations.”

25 Out of its own mouth, Wells confirms Plaintiffs’ fear that what it wants to do is re-
26 qualify them, or disqualify them for credit. This would be prejudicial and intimidating to
27 Plaintiffs.

28 Wells is demanding sensitive confidential information which is not relevant to
Plaintiffs’ claims or Wells’ defenses. Plaintiffs complain of Wells policies that kicked in *after*

1 a borrower had qualified for credit. At that point, Plaintiffs contend that Wells allowed
2 brokers and loan officers to tack on discretionary fees as part of its Discretionary Pricing
3 Policy, and that these fees were disproportionately assessed against minority buyers.
4 Plaintiffs do not allege that Wells improperly evaluated their creditworthiness. Therefore,
5 their creditworthiness is not at issue here, and it would not be a defense for Wells to
6 accusations that it assessed improper fees against minority borrowers.

7 Plaintiffs successfully distinguish the cases cited by Wells in support of its motion to
8 compel. (See Pltf Opp. At 6) The plaintiff in the *Kee* case cited by Wells Fargo had placed
9 his financial information directly at issue. The defendant bank in that case had subpoenaed
10 the plaintiff's account information for many transactions over a wide time frame from other
11 banks where the plaintiff-borrower had accounts, in addition to the bank of whose loan
12 Plaintiff complained. Even so, the court found the defendant's subpoena to be overbroad
13 because, as with Wells Fargo here, the defendant had requested information outside the
14 scope of the issues in the case. While the plaintiff sued the bank over a loan, the court
15 rejected the bank's attempt to obtain information about other accounts or transactions
16 unrelated in type and time to the transaction at issue. In fact the court in that case found
17 the subpoenas "appear to constitute the type of fishing expedition that is prohibited in
18 discovery under the federal rules," and limited production to "any and all documents relating
19 to checks written to Crown Bank and monthly balance information from October 2001 to the
20 present." *Kee*, 2007 WL 2406938 at *2. In this case, Wells Fargo wants Plaintiffs to
21 provide a broad swath of their financial information related to their creditworthiness and
22 financial acumen. Plaintiffs claim that Wells discriminated against them by assessing
23 discretionary fees after they had already qualified for loans. The highly personal and
24 confidential data that Wells is demanding is not relevant to either Plaintiffs' claims or Wells'
25 defenses.

26 Plaintiffs also reject Wells' objections to their citing the loan files in Wells'
27 possession. (Def. Memo at 9 -10) Plaintiffs invoke FRCP 33(d) as permitting them to refer
28 to business records in response to an interrogatory, where the burden of ascertaining the

1 answer is substantially the same for either party. Since Wells Fargo has Plaintiffs' loan files,
2 and in fact created them, it should have no trouble extracting the information.

3 In *Wilson v. Superior Court*, 63 Cal.App.3d 825, 830 (1976), cited by Wells, the
4 court held not surprisingly that a taxpayer waives the "taxpayer privilege" under California
5 common law when she sues her accountant for negligently advising her of the tax
6 consequences of a sale of real property while preparing her tax returns. The court's holding
7 is inapposite here, where Plaintiffs are not claiming negligent processing of their loans, but
8 rather discrimination.

9 Plaintiffs in the *Kee* and *Wilson* cases had plainly placed their finances at issue.
10 Plaintiffs in this case, however, also deny that their financial or real estate sophistication or
11 acumen are at all relevant to either their claims or Wells' defenses. They cite a number of
12 cases for the proposition that individualized circumstances surrounding each transaction
13 were irrelevant where there was an allegation of a national policy allowing a subjective
14 mark-up, as Plaintiffs allege in this case. *Cason v. Nissan Motor Acceptance Corp.*, 212
15 F.R.D. 518 (M.D. Tenn. 2002) (court certified class of plaintiffs who claimed to have been
16 victims of a subjective mark-up of the finance rate for their car loans. The court noted that
17 the individualized circumstances surrounding each transaction were irrelevant to a national
18 policy of allowing such a subjective mark-up. Plaintiffs also cite *Coleman v. GMAC*, 220
19 F.R.D. 64 (M.D.Tenn. 2004) (refusing to consider individualized factors such as educational
20 background and understanding of credit). (Pltf Opp. at 8) Plaintiffs also reject the notion
21 that any of their financial backgrounds might somehow be related to their ability to
22 represent the class. (Responding to Wells' Motion at 8).

23 This Court agrees that Plaintiffs' real estate sophistication and the purposes of their
24 loans: whether to buy a home, to finance investment property, or to obtain cash, are not
25 relevant to the question whether or not Defendant assessed discriminatory, discretionary
26 fees on borrowers. The information requested about Plaintiffs in Defendant's motion to
27 compel is irrelevant, and Wells' Motion to compel Plaintiffs' credit data and history is
28 denied.

Contention Interrogatories

1 Wells Fargo also demands that Plaintiffs supplement their answers to contention
2 interrogatories. Plaintiffs have already supplemented their answers to some of the
3 interrogatories, but some questions seek detailed damage information that Plaintiffs argue
4 they cannot provide without loan level data that Wells Fargo is improperly withholding.
5 Plaintiffs have moved to compel Wells Fargo to produce loan level data and other
6 information, and will answer the interrogatories after their experts have been able to
7 statistically analyze the loan data.


8 Plaintiffs aren't refusing to answer Wells' contention interrogatories, they just need
9 the loan level data to give to their experts for statistical analysis before they can answer.
10 FRCP 33(a)(2) authorizes a court to order that contention interrogatories "need not be
11 answered until the designated discovery is complete, or until a pretrial conference or some
12 other time." This case is still at the pre-certification stage. Wells has the burden of showing
13 how an early response to its contention interrogatories assists the goals of discovery, that
14 is, to significantly narrow the issues. *In re Convergent Technologies Securities Litigation*,
15 108 F.R.D. 328, 338 (N.D.Cal. 1985).

16 Neither Fed. R. Civ. P. 33(a)(2) nor applicable case law requires Plaintiffs to answer
17 the contention interrogatories until Wells Fargo has produced the information necessary for
18 them to do so. Plaintiffs ask the Court to deny Wells Fargo's demand for irrelevant
19 information and premature contention interrogatory answers as without merit, and deny its
20 Motion to Compel. This part of Wells' motion to compel is also denied, pending Wells'
21 production of the loan level data that Plaintiffs need to give to their expert for statistical
22 analysis before answering.

23 For all the above reasons, Defendant Wells Fargo's motion to compel further
24 discovery is denied.

25 IT IS SO ORDERED.

26 DATED: March 3, 2009

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28 
JAMES LARSON
Chief Magistrate Judge

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